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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 641

WHITIN MACHINE WORKS

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI

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INDEX

PETITION: Page No.

The Opinion of the Court Below 2

Jurisdiction of this Court 2

Question Presented for Review 2

Statutory Provisions Involved 3

Statement of the Case 3

Reasons Why Certiorari Should Be Granted 6

Argument Amplifying Reasons Why Certiorari Should Be Granted 7

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner above named respectfully prays this Court for a writ of certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review a decree which the said Court of Appeals has rendered in the above-entitled case. And the Petitioner respectfully shows to the Court:

The Opinion of the Court Below

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 217 F 2d 593.

Jurisdiction of this Court

The decree which the Petitioner seeks to have this Court review was rendered by the United States Court of Appeals for the Fourth Circuit on December 8, 1954 and was on that date entered upon the records of that Court. The Court of Appeals had jurisdiction to render such decree by virtue of the provisions of the National Labor Relations Act, Section 10 (e), 29 U.S.C.A. 160 (e).

Jurisdiction in this Court to review the decree of the Court of Appeals, through the procedure of certiorari, is established by the provisions of 28 U.S.C.A. 1254 and by the National Labor Relations Act, Section 10 (e), 29 U.S.C.A. 160 (e).

Question Presented for Review

Does the National Labor Relations Act unvaryingly require an employer to furnish certain information to a union representing his employees?

or

Is it not rather the true principle that whether the employer must furnish such information is to be judged, like all his other dealings with the employee representative, by the fundamental standard of good faith bargaining upon all the pertinent facts and circumstances?

Statutory Provisions Involved

National Labor Relations Act, Section 8 (a) (5), 29 U.S.C.A. 158 (a) (5):

> "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . ."

National Labor Relations Act, Section 8 (d), 29 U.S.C.A. 158 (d):

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . , but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ."

Statement of the Case

During the latter part of 1952 and early part of 1953 the Petitioner, Whitin Machine Works, and the United Steelworkers of America, CIO, as representative of the employees at the Petitioner's Charlotte, North Carolina plant, were engaged in collective bargaining for the purpose of arriving at a contract covering these employees.[1] The National Labor Relations Board found that these

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[1]The Company for a number of years had collective bargaining contracts with a Union representing the employees at its Charlotte plant and for many years has had, and still has, at its main plant in Whitinsville, Massachusetts, a collective bargaining contract with the United Steelworkers of America, CIO.

negotiations were characterized throughout by a good faith attitude on the part of the Petitioner and not by any "bad faith rejection of the collective bargaining principle" (B. A. 33, 30, 17).[2]

During the bargaining negotiations between the Company and the Union the principal disagreement that developed was as to whether the Company should grant a general wage increase (B. A. 17, 27, 33). The Company took the position that it was paying as much and more than its competitors in its area (8); that if it put in a general wage increase, it would be going beyond "the area standard"; and that it had "to stay competitive and not price itself out of the market" (8, 18, 19; B. A. 17). The Union took issue with this, contending that the Company's wage scale was "not up to the area level" (19).

At the Union's request, the Company furnished the Union with a list of "thirty-five or forty" of the Company's principal competitors (10). The Company also furnished to the Union a copy of an up-to-date Government "survey of fifty-seven manufacturing concerns" in "the Charlotte area" (9), which showed that "in each case (the Company's) rates were higher than the rates shown as being the rates paid in the area at that time, at the time of that survey" (10). The Union produced a letter from the North Carolina Department of Labor which appeared to indicate a higher average wage than the Company was paying. The Company thereupon,

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[2]Unless otherwise indicated all page references are to the appendix record on appeal printed by the Respondent (now the Petitioner in this Court) for the Court of Appeals. References to portions of the record printed in the appendix of the National Labor Relations Board in the Court of Appeals are designated as "B. A." Any references to portions of the written transcript not printed in either appendix in the Court of Appeals are designated "Tr."

thoroughly and in detail, pointed out wherein this letter was not applicable to the Company's situation (10-13).

The Union further asked the Company for the name, job classification, wages and seniority position of each employee. The only reason advanced by the Union for this request was that it needed such information in order "to compare" the Company's rates "with the area rates" (12, 20, 22, 23). The Company thereupon furnished to the Union the name of each employee, his job classification and his seniority position (12, 13, B. A. 17, 21-24). The Company also supplied the Union with a schedule showing each and every wage rate paid by the Company and the number of employees paid at each rate (12, 13, B. A. 17, 25-26), likewise a schedule showing the Company's wage ranges and the job classifications in each range and the number of employees in each job classification thereunder (15, B. A. 17, 19-20). The only element of information requested by the Union and not furnished by the Company was the names of the persons paid at each rate (B. A. 34).

As pointed out by the Chairman of the National Labor Relations Board (B. A. 33), the failure of the Company to supply this item of information was not "a significant factor" obstructing agreement between the parties, but the Company and the Union reached "an impasse" by reason of the Union's insistence upon, and the Company's unwillingness to grant, "a general wage increase."

The Union never gave any reason for wanting the names of employees coupled to wage rates except for the general statement that all the wage information requested was needed "for comparing" the Company's rates with other "rates in the area." (16-17, 20, 22, 23, 24.)

Neither the Board nor the Court below says that the *names* of persons who get certain wages is in any way necessary or pertinent to a comparison of a Company's wages with the wages paid by other employers—so long as the Company's job classifications and the wage range of each classification is known. In this case, as has been noted above, very considerable information beyond this was furnished, namely, the number of employees in each job classification, a listing of the employees by name with the job classification of each, and a listing of the number of employees paid at each rate in the company's wage scale.

The Company presented detailed testimony demonstrating that the information which it had furnished enabled the Union to analyze the Company's wage structure and to evaluate it and compare it with that of other employers in every way (13-17, 18-23). Such testimony was in no way contradicted.

Reasons Why Certiorari Should Be Granted

1. This case involves a question which is of general importance in the administration of the National Labor Relations Act.

2. The decision below represents a fundamental misconception as to the nature of the bargaining requirements of the National Labor Relations Act.

3. The decision below if projected into future rulings and not corrected, will result in basic distortion of the National Labor Relations Act.

Argument Amplifying Reasons Why Certiorari Should be Granted

The substance of the Board's ruling in this case, as affirmed by the Court below, is that the employer's duty to furnish certain wage information, if requested, follows automatically upon the establishment of an employee bargaining agency. Otherwise expressed, the ruling is that no matter whether the bargaining agent shows any present reason or need for the information and no matter whether the information has any relevance to anything under consideration between the employer and the bargaining agent, the information must nevertheless be furnished to the bargaining agent simply because it is bargaining agent and may, at some time or other, need the information "to properly and understandingly perform its duties."[1]

The Board's Trial Examiner[2] and likewise one member of the Board declined to accept such view. They adhered to what has always heretofore been the fundamental principle governing the dealings of an employer with an employee representative, namely, that the employer shall accord recognition to such representative and shall then bargain with the representative, and that in the course of such dealing he must do whatever is necessary to constitute good faith bargaining in the light of all the relevant facts and circumstances. Taking leave, however, of this sound principle, the ruling below is that in case of the particular omission here in question, namely the failure to furnish certain wage information, no examina-

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[1]Opinion in the Court below, 217 F 2d 593, 594.

[2]Cf. Universal Camera Corporation vs. National Labor Relations Board 340 U. S. 474, 71S. Ct. 456, 95 L Ed 456.

tion of the pertinent circumstances, to determine whether good faith has been breached, is necessary—for that, as the Board and the Court below hold, the failure to furnish such information to a bargaining agent is automatically and *per se* a violation of the Act.

The furnishing of the wage information here in question may seem to the Court of little practical moment one way or the other. But the error of principle in the ruling below is important and represents a fundamental departure.

It is obvious, from what has already been said, that the Petitioner is not contending that the ruling should be that an employer is never required to furnish the information in question to a bargaining agent. The Petitioner is simply contending that the Board and the Court below were wrong in ruling that an employer must *always* and as a matter of law furnish such information to a bargaining agent. The Petitioner is asking only that the matter of supplying information, like every other element in the realm and process of collective bargaining, be subjected to, and adjudicated upon, the test of good faith.

In determining whether bargaining has been in good faith, a basic and most natural inquiry is:—What was the relevancy of the matter in controversy to the subject or subjects under discussion and what showing of reasonable need or necessity did either party make with respect to such matter. In the present case all evidence showed clearly and affirmatively that with respect to the subjects under discussion, that is whether the company should grant a general wage increase and whether its wage scale was up with its competitors, the item of information in question, that is the coupling of the names of employees

to wage rates had no relevancy whatever, nor did the bargaining agent make, or purport to make, nor does the Board or the Court below say that it made, any showing, reasonable or otherwise, as to any need or necessity, for its having the particular item of information here in question.

Yet the Board ruled and the Court affirmed, that "specific need" for information "as to a particular issue" is immaterial (B. A. 29). As expressed by the Chairman of the Board in his concurring opinion, the reason *"if any"* for requesting the information is of no moment (B. A. 32): and there need be no showing of "precise relevancy of the requested information to particular current bargaining issues" (B. A. 32); and the information requested must "be made available to the bargaining agent without regard to its immediate relationship to the negotiation or administration of the collective bargaining agreement" (B. A. 33).

In judging whether bargaining has been in good faith, another usual and natural inquiry is:—What response was made to requests, or what reasonable effort was made to respond or offer alternative satisfaction. Here the evidence shows a very genuine effort by the Company to supply information requested on the subject under discussion, and indeed a full supplying of all information necessary or relevant to such subject. Yet the Board and the Court below, not even purporting to evaluate this response, its reasonableness or its sufficiency in the light of all the pertinent facts and circumstances, simply declare that since further information was requested, it was *ipso facto* a violation of the Statute for the Company to fail to furnish it.

This ruling seems all the more extraordinary when one considers the express provisions of the Statute. For the Act specifically and affirmatively provides, 29 U.S.C.A. 158 (d), that collective bargaining involves no obligation on any party "to agree to a proposal" or make "a concession." Yet the Board, with the affirmation of the Court below, has now redrafted this Statute to provide that the employer *must agree* to a proposal that he supply the information here in question and must do so as a matter of statutory duty, without reference to ordinary standards of good faith and without reference to any other facts and circumstances bearing upon the matter. It is submitted that the Board cannot thus rewrite, and indeed reverse, the positive provisions of the National Labor Relations Act.

The principle for which the Petitioner contends has been reiterated again and again by the Courts. In a case where, as here, the Board had declared the taking of a certain position in collective bargaining to be *per se*, and as a matter of law violative of the statute, this Court said:

> "As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining was retained and written into Section 8 (d) of the National Labor Relations Act. That section contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession."
>
> . . .

"The Board offers in support of the portion of its order before this Court a theory quite apart from the test of good faith bargaining prescribed in Section 8 (d) of the Act, a theory that Respondent's bargaining for a management functions clause as a counterproposal to the Union's demand for unlimited arbitration was, 'per se,' a violation of the Act."

"If the Board is correct, an employer violates the Act by bargaining for a management functions clause touching any condition of employment without regard to the traditions of bargaining in the particular industry or such other evidence of good faith as the fact in this case that Respondent's clause was offered as a counterproposal to the Union's demand for unlimited arbitration."

. . .

"Accordingly, we reject the Board's holding that bargaining for the management functions clause proposed by Respondent was, per se, an unfair labor practice."

. . .

"The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8 (d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether."

National Labor Relations Board vs.
American National Insurance Company,
343 U. S. 395, 96 L Ed 1027,
73 S. Ct. 824

National Labor Relations Board vs. Boston-Herald Traveler Corporation, 219 F 2d 134 (C. A. 1) was a case, like the present one, in which the precise question at issue was whether the employer should be required to furnish "wage data specifically linking the name of each employee with his or her actual salary." The employer contended that neither "good faith bargaining in this particular case" nor the Board's order properly interpreted, compelled it to identify salaries by names of employees. The Court upheld the employer's position.

Invariably the Courts have accepted and applied the principle that good faith under all the circumstances of the case is the test of any response made or position taken in collective bargaining. The cases relied upon by the Board and cited by the Court below are not to the contrary. In most of these cases the employer was not declining to furnish a certain item or type of wage data but was refusing to furnish any wage data to the bargaining agent. More importantly, however, in all of these cases the principle is recognized and affirmed that information must be supplied if and when and because it is relevant to an issue being bargained upon, and if and when and because it is a matter of good faith bargaining upon that issue.

For example, in *National Labor Relations Board vs. Yawman and Erby Manufacturing Co.*, 187 F 2d 947 (C. A. 2) the Court held that the information there in question was "clearly relevant" to the negotiations there involved. In *National Labor Relations Board vs. Leland-Gifford Co.*, 200 F 2d 620 (C. A. 1) the information which had been requested was held "relevant," among other things, to an "issue of wage inequities" among the employees. In *National Labor Relations Board vs. Hekman Furniture Co.*, 207 F 2d 561 (C. A. 6) the Court required

the employer to furnish the information requested "in the circumstances of the case." *Aluminum Ore Co. vs. National Labor Relations Board*, 131 F 2d 485 (C. A. 7) was a case in which it does not appear precisely what wage information was in question, but in any event the bargaining was not, as in the present case, upon a demand for a general wage increase but was upon a demand for individual wage increases.

In *National Labor Relations Board vs. New Britain Machine Co.*, 210 F 2d 61 (C. A. 2) the employer was refusing to supply any of the information requested in the bargaining negotiations. In *National Labor Relations Board vs. Otis Elevator Co.*, 208 F 2d 176 (C. A. 2) the same Court affirmed the principle that whether wage information must be supplied is to be decided upon "the standard of relevance" under the circumstances of the case. And the case of *National Labor Relations Board vs. Jacobs Manufacturing Co.*, 196 F 2d 680 (C. A. 2), from the same Court, very clearly states and adopts the fundamental principle for which the Petitioner is now contending. The Court in that case said:

> "We do not understand this part of the order to require the Respondent to do more than show its good faith in bargaining collectively . . . As we interpret this, the requirement of disclosure will be met if the Respondent produces whatever relevant information it has to indicate whether it can or cannot afford to comply with the Union's demand."

A collateral aspect of the present case which perhaps deserves attention is the consideration that if the Union wanted to know the wages of employees individually

and by name there would seem to be no good reason why it should not have asked *them* for such information. This is all the more reasonable when it is remembered that the Union, as bargaining agent, was their agent and they were its principals. It is indeed paradoxical that a third party has been here prosecuted for failure to give an agent information about the agent's principals.

It is common knowledge that many people do not wish their individual wages and earnings to be disclosed by their employer. And in the present case the Company "more than once" suggested to the Union (18) that if it wanted such personalized information, the natural thing to do would be to ask the individual employees for it—particularly since they were principals to the Union and the source of its entire authority. The Union, however, neither took any steps in that direction nor made any effort to explain why it did not do so. All of this the Board and the Court below ignored.

It was stressed by the Chairman of the Board that in numerous cases before the Board there have been disagreements "as to whether particular wage information sought by the bargaining agent is sufficiently relevant to particular bargaining issues" and that the "broad rule" announced by the Board in the present case "is necessary to avoid the disruptive effect" of such "bickering and jockeying" (B. A. 33). Thus since there are problems and difficulties attendant upon determining what is and what is not a reasonable and good faith furnishing of information under all the circumstances of each case, the solution adopted was simply to announce an unvarying and automatic rule of law that the employer must furnish *whatever* of such information the bargaining agent might request.

WHEREFORE, upon all of the foregoing, the Petitioner respectfully prays the Court to grant a writ of certiorari in this case to the end that the Court may review the decree which was rendered in the Court below.

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APPENDIX

Opinion of the Court of Appeals For The Fourth Circuit

PER CURIAM:

This is a petition by the National Labor Relations Board to enforce an order directing the Whitin Machine Works to furnish the bargaining union representing its employees the individual wage rates of these employees. It appears that, in the course of negotiations with respondent, the union representing its employees asked this information and that respondent refused to furnish it, although it did furnish a list containing the names of all employees, their individual job categories and the dates on which they were hired. It also furnished a list of the hourly wage rates paid at the plant, not showing, however, the individual wage rates of the individual employees, and a schedule of the existing rate ranges paid at the plant together with the number of employees within each rate range. The Board held that, notwithstanding the information furnished, it constituted a violation of section 8(a)(5) of the Act not to furnish the information requested. The Board said:

> "An examination of the wage information furnished by the respondent shows that from such information the union could not possibly determine what each individual employee it represented was earning.
>
> "We are convinced that the authority conferred by section 9(a) of the Act upon a union representing a majority of the employees in an appropriate unit entitles the union to all wage information essential to the intelligent representation of the employees and that when such information is reasonably available only from the employer's records, it is the employer's duty,

on request, to accommodate the union. The courts have consistently agreed with this construction of the statute. In the instant case no showing has been made that compliance with the union's request would have placed an unwarranted and undue burden on the employer.

"Refusal by an employer to supply such necessary information makes impossible the full development of the collective bargaining negotiations which the statute is intended to achieve. It therefore constitutes a violation of section 8(a)(5) of the Act. This doctrine extends to a union's right to request and to receive from the employer the names of the employees in the appropriate unit together with their individual wage rates. Contrary to the suggestion of our dissenting colleague, the union in this case sought the names of individuals coupled with their wage rates not only to achieve a general wage increase but for the purposes of collective bargaining generally. In this respect, we agree with the statement of our concurring colleague, that in these cases it is sufficient that the information sought by the union is related to the issues involved in collective bargaining, and that no specific need as to a particular issue must be shown."

It is well settled that it is an unfair labor practice within the meaning of section 8(a)(5) of the Act for an employer to refuse to furnish a bargaining union a list of the employees represented by it together with the wages paid them, as such information is necessary to the proper discharge of the duties of the bargaining agent. *Aluminum Ore Co.* v. *N.L.R.B.*, 7 Cir. 131 F. 2d 485, 487; *N.L.R.B.* v. *Yawman & Erbe*, 2 Cir. 187 F. 2d 947, 948, 949; *N.L.R.B.* v. *Leland-Gifford Company*, 1 Cir. 200 F. 2d 620, 624; *N.L.R.B.*

v. *Hekman Furniture Co.*, 6 Cir. 207 F. 2d 561, 562; *N.L.R.B.* v. *New Britain Machine Co.*, 2 Cir. 210 F. 2d 61, 62. It is argued that the information furnished here was sufficient for dealing with the existing controversy between the parties as to a wage increase; but we agree with the Board that the union, as bargaining agent of the employees, was entitled to information which would enable it to properly and understandingly perform its duties as such in the general course of bargaining and that such information should not necessarily be limited to that which would be pertinent to a particular existing controversy. At all events, this was a matter which Congress has committed to the jurisdiction of the Board. We may set aside the Board's action in such a matter only if it has acted without substantial evidence or has abused its discretion in the premises, which is manifestly not the case here.

The order of the Board will be enforced.

Order Enforced.

Decree of the Court of Appeals For The Fourth Circuit

This case came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Whitin Machine Works on the 28th day of June, 1954, in proceedings before the said Board numbered 34-RC-371 and 11-CA-494, entitled "In the Matter of Whitin Machine Works, Employer and United Steelworkers of America, CIO, Petitioner," and "Whitin Machine Works and United Steelworkers of America, CIO"; upon the answer of the respondent; and

upon the transcript of the record in said proceedings, certified and filed in this court; and the said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit that the said order of the National Labor Relations Board be, and it is hereby, enforced; and that the said Whitin Machine Works abide by and perform the directions of the National Labor Relations Board in said order contained.

JOHN J. PARKER
Chief Judge, Fourth Circuit.

MORRIS A. SOPER
United States Circuit Judge.

ARMISTEAD M. DOBIE
United States Circuit Judge.